

Mr. Watson for the chargor has contended that as the document was not properly stamped it should not have been registered; and suggests that under section 43 of the Stamp (Amendment) Enactment 1937 the document cannot be registered unless duly stamped. The fact remains that it was registered whether it was duly stamped or not, and it having been passed by the registering authority as being fit for registration once the document is on the register, it can, at this late stage only be impeached on the ground of some error or that the document was insufficient or void. In this case, there is no question of revenue having been defrauded. Someone, we do not know who, put that stamp on. It may have been the Collector of Land Revenue himself, when he realised the mistake. Anyhow, as it is, the document bears in stamps the correct amount of the duty for a charge.

Mr. Seenivasagam for the respondent has quoted a number of cases, especially Indian cases, one of which in particular reported in *23 Calcutta Weekly Notes*, page 534, says that improper registration cannot possibly affect the validity of the document.

The chargee in this case is seeking to exercise his rights under the charge, and I can see nothing to prevent him doing so, as fully as he wishes.

The petition must be dismissed with costs.

Petition dismissed with costs.

[APPELLATE CIVIL JURISDICTION]

CUSSEN, J.

July 22, 1940.

CHAN CHEONG THENG

vs.

CHAN PHOOI HOONG.

[SELANGOR CIVIL SUIT No. 54 of 1940]

Civil Procedure Code (Cap. 7), section 460—Summary Procedure—Conditional leave to defend.

The plaintiff sued, by way of summary procedure, for the sum of \$25,000 promised to be paid by the defendant under a written document. The consideration stated consisted of the cancellation of certain liabilities by a deceased third party to the plaintiff.

In his application for leave to defend, an affidavit was filed by the defendant alleging that the document had been given subject to the condition that the plaintiff would produce proof of these liabilities: this had not been done: at the time of making the document the claims were barred by limitation and there was no consideration for the promise to pay: and lastly the document was procured by fraudulent misrepresentation.

The plaintiff filed an affidavit in reply purporting to dispose of these allegations, and no answer to this affidavit was filed when the application was heard by the Registrar.

The Registrar gave leave to defend, conditionally upon the defendant finding security in the sum of \$25,000. The defendant appealed, and during the hearing of the appeal was allowed to file further affidavits in answer to the plaintiff's reply.

Held, that sub-section (ii) of section 460 of the Civil Procedure Code requires, before any question of ordering security can arise, that the Court must either think the defence not to be *prima facie* sustainable or feel a reasonable doubt as to its good faith. But when the Court so thinks or feels that does not mean that an order for security must follow as a matter of course. There still remains a discretion to be exercised as to whether or not an order for security should be made.

APPEAL FROM REGISTRAR.

B. J. P. Joaquim and H. Y. Teh for defendant.

Sub-section (i) of section 460 of the Civil Procedure Code is for practical purposes the same as O. XIV, r. 1. The English authorities make it clear that in this case, having regard to this sub-section by itself, unconditional leave to defend should have been given.

Sub-section (ii) does not enlarge a plaintiff's right to security: it narrows it in this way, that even when conditions might be imposed under sub-section (i) by itself, still they shall not be imposed unless the requirements of sub-section (ii) are also present.

E. D. Shearn for plaintiff.

Having regard to sub-section (ii) the principles laid down in *Jacobs v. Booths' Distillery* (1901) 85 L.T. 262 do not apply to our Code. The Registrar thinking that the defence was not *prima facie* sustainable and feeling a reasonable doubt as to its good faith, it cannot be said that he was wrong in ordering security.

Cussen, J.—This is an appeal against an order made by the Registrar under section 460 of the Civil Procedure Code, requiring the defendant, as a condition of being granted leave to defend the suit, to pay into Court or give security for the payment of the amount claimed in the suit, i.e., \$25,000.

Section 460 of the Civil Procedure Code reads as follows:

"460. (i) The Court shall, upon application by the defendant, give leave to defend the suit, upon the defendant paying into Court the sum mentioned in the summons or upon evidence, satisfactory to the Court, which discloses a defence or such facts as the Court may deem sufficient to support the application, and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit.

(ii) The defendant shall not be required to pay into Court the sum mentioned in the summons or to give security therefor unless the Court thinks his defence not to be *prima facie* sustainable or feels reasonable doubt as to its good faith."

I see no difficulty in the construction of this section.

Sub-section (ii) requires, before any question can arise of ordering payment or security for the amount of the claim, that the Court shall either think the defence not to be *prima facie* sustainable or feel a reasonable doubt as to its good faith.

But when the Court so thinks or feels, that does not mean that an order must follow as a matter of course.

There still remains a discretion to be exercised, on material before the Court in the particular case, as to whether or not an order for payment or security should be made.

It is hardly possible or perhaps desirable to formulate any exact rules for the exercise of that discretion; but this much may, I think, be said, that it must depend upon the degree of certainty with which the Court thinks the defence *prima facie* not sustainable or on how strong is the feeling of reasonable doubt as to the good faith.

In the present case it is not on record whether the learned Registrar thought the defence not sustainable or felt doubt or both.

However, both Counsel agree that the Registrar did state that he felt a reasonable doubt of the good faith of the defence, and Counsel for the plaintiff says that the Registrar also thought the defence *prima facie* not sustainable.

There is now before me, put in during the hearing of this appeal, fresh evidence by affidavit from the defence which was not before the Registrar and which materially affects the question whether the defence is *prima facie* sustainable.

It is not now contended by Counsel for plaintiff that it is not *prima facie* sustainable.

I have therefore decided, while bearing in mind that the exercise of discretion under this section is not to be lightly interfered with, to vary the order of the Registrar by reducing the amount for which security is to be given—under section 460 (i)—to \$5,000.

The costs will be costs in the cause, save that the defendant shall not in any event get the costs

occasioned by the fresh affidavits and the further hearing on the 8th July, 1940, resulting therefrom.

Order of Registrar varied

[ORIGINAL CIVIL JURISDICTION]

CUSSEN, J.

August 31, 1940.

LIM SONG vs. W. J. P. GRENIER.

[SELANGOR CIVIL SUIT No. 38 of 1940]

The Mining Enactment (Cap. 147), section 36 and Schedule X—Sub-lease for "the remaining periods of the said mining leases"—Mining leases renewed by Resident—Renewal period not covered by sub-lease.

In June, 1935, the plaintiff sub-leased certain mining lands to the defendant in accordance with the provisions of the Mining Enactment. The sub-lease was "for the remaining periods of the said mining leases." One of the leases was due to expire on the 25th June, 1937, and in May, 1936, the plaintiff applied to the Resident for renewal of that lease. The Resident extended the term of the lease until the 5th September, 1943. The plaintiff brought this action claiming, *inter alia* a declaration that the sub-lease did not cover the period of the lease subsequent to its original date of expiry.

Held, that the construction of the sub-lease must be confined to the document itself, which is of the highest degree of formality. The form of a memorandum of sub-lease is prescribed and set out in Schedule X, which contains as foot-note (b):

"(b) Add term of sub-lease, e.g., 'five years' or 'of the said lease or of any renewal thereof for which renewal the sub-lessor hereby undertakes to apply if so desired by the sub-lessee'."

The defendant should have followed this direction if he wished the period of the sub-lease to extend over any renewal period of the lease, and the sub-lease accordingly expired on the 25th June, 1937.

P. C. Au Yong for plaintiff.

H. Y. Teh for defendant.

Cussen, J.—Mining lease No. 3900 was granted by the Ruler of the State to the plaintiff as lessee on 26th June, 1928; the period of the lease being for nine years.

On the 6th June, 1935, the plaintiff sub-leased the land to the defendant under the provisions of section 36 (i) of the Mining Enactment (Cap. 147). Section 36 (i) reads:

"36. (i) If any lessee wishes to sub-lease his land such lessee and the intended sub-lessee shall execute and present together with the mining lease a memorandum of sub-lease in the form in Schedule X with such variations of the form but not of the substance as the Collector may permit, and thereupon the Collector shall register the same...."